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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DIAMOND AUTO BODY, INC., Plaintiff and Respondent, v. SAIMA OF NORTH AMERICA, INC., Defendant and Appellant.	B201850 (Los Angeles County Super. Ct. No. LC077261)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Adler, Judge. Reversed.

Law Office of Lorraine L. Loder, Lorraine L. Loder, Orren & Orren and Tyna Thall Orren for Defendant and Appellant.

Robert Hirschman & Associates and Robert Hirschman for Plaintiff and Respondent.

Defendant and appellant SAIMA of North America, Inc. (SAIMA) appeals the default judgment entered in favor of plaintiff and respondent Diamond Auto Body, Inc. (Diamond), as well as the trial court's denial of its motion to set aside entry of default. We conclude that the trial court erred in denying the latter motion, and so reverse the judgment.

FACTS AND PROCEDURAL SUMMARY

Diamond is in the business of repairing motor vehicles damaged in collisions. In May or June of 2006, Diamond placed an order with defendant California Spray Booth Systems Inc. (Cal Spray) for an "Accudraft Titan paint spray booth" (the equipment) for use in its business. Diamond paid Cal Spray $72,500 to secure its order of the equipment.

SAIMA manufactures the brand and model of the equipment ordered by appellant from Cal Spray, and is the exclusive distributor of the equipment in the United States, with offices in Randolph, New Jersey. SAIMA is owned by its president, Guido Pippa.

Diamond never received the equipment ordered from Cal Spray. Consequently, on March 5, 2007, Diamond filed its complaint against SAIMA and Cal Spray; it also named as defendants Cal Spray's sole shareholder, Maurice Carmichael, and Auto Body Equipment Sales, a dba of Mr. Carmichael and/or Cal Spray. The parties refer to Cal Spray, Auto Body Equipment Sales and Mr. Carmichael together as the Carmichael defendants.

As Diamond did not order the equipment directly from SAIMA, it alleged that SAIMA was liable as the principal of its agents, the Carmichael defendants, who allegedly were acting for and on its behalf. Of the complaint's five causes of action, the first four were against all defendants for, respectively, fraud, negligent misrepresentation, breach of contract and money had and received, while the fifth was against appellant alone for negligence in allowing the Carmichael defendants to defraud respondent.

The complaint was mailed to SAIMA by certified mail on March 9, 2007, and received on or about April 10, 2007. Upon receipt of the summons and complaint,

SAIMA hired California counsel to represent it in the lawsuit. SAIMA believed that the lawsuit was meritless, since its liability was based solely on the premise that it was the principal of the Carmichael defendants, when in fact it had no agency relationship with these defendants. SAIMA's initial response to the lawsuit was therefore to request that Diamond dismiss it from the case.

When SAIMA's request for dismissal was rebuffed, SAIMA's counsel requested an extension to May 18, 2007 to respond to the complaint, since Mr. Pippa was out of the office tending to the illness and eventual death of his mother-in-law. Upon his return to the office in early May, Mr. Pippa undertook a review of company files to determine whether SAIMA's records supported his conclusion that there was no agency relationship between SAIMA and the Carmichael defendants.

On May 11, 2007, SAIMA forwarded to Diamond's attorney email correspondence which SAIMA believed established the absence of an agency relationship upon which the lawsuit was premised. While awaiting Diamond's response to that evidence, Mr. Pippa was required to travel to Italy in response to a business emergency at the company's manufacturing plant. Due to Mr. Pippa's absence, SAIMA's counsel requested a second extension of time, until June 1, to respond to the complaint.

When Mr. Pippa returned from Italy on June 4, he learned that Diamond had never responded to his May 11 letter. He therefore again attempted to contact Diamond to discuss settlement. He was waiting for a return call from Diamond when, on June 8, Diamond filed a request for entry of default without prior notification to SAIMA's counsel.

Upon receipt of the request for entry of default, SAIMA's counsel assumed that a default had been entered. In fact, Diamond's original request for entry of default was rejected, and the default was not actually entered until June 14. After it learned of the rejection of Diamond's initial default request, SAIMA's attorney attempted, unsuccessfully, to file SAIMA's answer and cross-complaint (against the Carmichael defendants), on June 20, 2007.

On July 10, 2007, SAIMA filed a motion to set aside the default pursuant to Code of Civil Procedure section 473, subdivision (b). Shortly thereafter, while SAIMA's motion was pending, Diamond filed its prove-up papers, which resulted in entry of a judgment in its favor on July 19, 2007, prior to the July 31 hearing on the motion to set aside the default. The trial court denied the motion to set aside the default.

SAIMA appeals both the denial of its motion to set aside the default, and the entry of judgment.

STANDARD OF REVIEW

Code of Civil Procedure section 473, subdivision (b) (hereafter, section 473) provides that a defendant against whom a default has been entered may move the trial court to set aside the default under two discrete scenarios: (1) the trial court may, in the exercise of its discretion, set aside the default if it determines that the default was taken against the defendant as a result of the mistake, inadvertence, surprise, or excusable neglect of either the party or his or her legal representative; and (2) "the court shall" set aside the default if, within the prescribed time frame, the application for relief "is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect . . . unless the court finds that the default . . . was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. . . ." The first scenario may be described as "discretionary relief" while the second may properly be referred to as "mandatory relief" or relief based on "attorney fault."

Mandatory relief, as the name implies, permits no exercise of discretion. "If the prerequisites for the application of the mandatory relief provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief. (*Leader v. Health Industries of America, Inc.* [(2001)] 89 Cal.App.4th 603, 612.) Where, as here, the applicability of the mandatory relief provision does not turn on disputed facts and presents a pure question of law, our review is de novo. (*Ibid.*)" (*SJP Ltd. Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516.)

Discretionary relief under section 473 "lies within the sound discretion of the trial court and will not be disturbed except for a trial court's abuse of discretion." (*Robbins v. Los Angeles Unified School Dis.* (1992) 3 Cal.App.4th 313, 319, citations omitted.) "That discretion, however, "'is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'" [Citations.]" (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898.)

In conducting our review, we are mindful of the fact that "[i]t is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854.)" (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) "When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief." (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343.) Given the policy strongly favoring trial and disposition on the merits, "'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.'" (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980, quoting *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.)

DISCUSSION

We begin our discussion by noting that SAIMA's counsel, both in the trial court and in her briefs on appeal, did not clearly distinguish between the mandatory and the discretionary relief provisions of section 473. Thus, for example, in its motion to set aside the default, SAIMA sought relief "on the basis of attorney mistake, inadvertence, surprise, or excusable neglect," suggesting attorney fault as the basis of the motion. Attorney Lorraine Loder's declaration in support of the motion, however, did not

explicitly state that the entry of default was her fault. Nevertheless, in its memorandum of points and authorities in support of the motion to set aside the default, SAIMA explained that "Upon Pippa's return from Italy on June 4th, he wanted to make one last attempt to resolve the matter with plaintiff and attempted to contact plaintiff directly to discuss a resolution of the case. Because Loder had had several contacts and conversations with plaintiff's counsel and had received two extensions from him, and expected him to extend her the professional courtesy of notice prior to seeking a default, she did not file an answer to the complaint while Pippa attempted to directly resolve the matter with plaintiff. Pippa, however, did not receive a response from plaintiff." As Ms. Loder explained in her declaration in support of the motion, "While [Mr. Pippa] was waiting for a response from Diamond, I received a copy of the Request for Entry of Default from plaintiff's counsel on or about June 8th."[1] These facts clearly support a conclusion that Ms. Loder was "at fault;" she permitted the June 1 deadline to pass without filing a responsive pleading, requesting an extension of time in which to respond, or applying to the court to secure such an extension. Indeed, there is no indication that Ms. Loder explained to Mr. Pippa the substantial legal risks of his preferred course of action: to try one last time to convince Diamond to dismiss the lawsuit.

While the papers in support of the motion did not clearly articulate precisely the relief being sought, Ms. Loder made clear SAIMA's position at the hearing on the motion. She began her remarks with the statement: "there is excusable neglect, excusable negligence and attorney fault in the matter, which would require the court to set aside the default. Certainly while we were representing SAIMA, we did not file a response to the complaint even though the period for filing had [] passed, knowing that the other side had granted an extension, but that the extension had now gone beyond its time frame. I think that alone mandates that the court set aside the default because certainly there was attorney fault involved." The trial court responded to the foregoing

[1] As noted above, for unidentified reasons, Diamond's initial request was rejected. A new request was accepted for filing on June 14, 2007.

by stating "your declaration doesn't say that." Ms. Loder also argued that her client's mistake in attempting to persuade Diamond to dismiss the lawsuit instead of simply filing a timely answer fell well within the category of client errors subject to discretionary relief under section 473.

In an extensive written ruling, the trial court treated SAIMA's motion as a request for relief under both the discretionary and the mandatory provisions of section 473. With respect to discretionary relief, the court determined that the reason that Ms. Loder did not file an answer on behalf of SAIMA was because her client wanted "to continue negotiating." Said the court: "This [is] insufficient because the client (as opposed to the attorney) made a tactical decision to not timely file an Answer despite the fact that an Answer was due on June 1, 2007. Where a client makes such a tactical decision, such is not a basis for relief under CCP § 473 since such a decision is neither a 'mistake, inadvertence, surprise [nor] excusable neglect.'" Thus, the court apparently concluded that discretionary relief was not available because the client's conduct did not fall within any of the four categories justifying relief. In this the court erred.

There is no rule of law that a positive (or what the trial court terms "tactical") decision or action, as opposed to a passive state of inattention or indecision, disqualifies a litigant from discretionary relief under section 473. And indeed, the scenario presented here is an example of just such a mistake. Mr. Pippa mistakenly believed that his evidence of the non-existence of an agency relationship between SAIMA and the Carmichael defendants would persuade Diamond to dismiss SAIMA from the lawsuit. SAIMA promptly sought relief from default, no prejudice to Diamond was shown,[2] and SAIMA appeared to have a meritorious defense to the lawsuit. Under these circumstances, SAIMA's mistake in delaying the filing of a responsive pleading for a few

[2] Diamond made no argument that it would be prejudiced by a ruling in SAIMA's favor, either in the trial court or in this court on appeal.

days while it attempted to convince Diamond to dismiss the lawsuit,[3] constituted more than the "very slight evidence . . . required to justify relief." (*Mink v. Superior Court, supra*, 2 Cal.App.4th 1338, 1343.) Given the policy strongly favoring trial on the merits, the trial court should have exercised its discretion to set aside the default based on SAIMA's conduct.

In ruling on SAIMA's application for mandatory relief, the court determined that Ms. Loder had not filed an affidavit of fault, and that, having failed to meet the requirements of the mandatory relief provisions of the statute, such relief was unavailable. The court was mistaken.

The motion for relief, together with the supporting documentation, including Ms. Loder's declaration, make clear that Ms. Loder permitted the June 1 deadline to pass without filing a responsive pleading, requesting of Diamond an additional extension of time to respond, or seeking the court's intervention. Instead, Ms. Loder miscalculated the risks of delaying the filing of a responsive pleading until settlement attempts had been exhausted.[4] Consequently, the evidence before the court established that SAIMA's default was entered as a result of the attorney's conduct. During argument on the motion, if not in the declaration itself, Ms. Loder clearly accepted responsibility for mistakenly assuming, based on her prior conversations with Diamond's attorney, that Diamond

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[3] The trial court assessed the client with responsibility for making the tactical decision to continue to negotiate, when it was the lawyer alone who can be charged with knowledge of the legal ramifications of the client's "tactical decision" – entry of default and a default judgment. Nowhere is it suggested that Mr. Pippa knew that he was risking a $72,500 default judgment in a case he clearly believed lacked all merit when he made the "tactical decision" to try to contact Diamond one last time to resolve the matter short of trial. To the contrary, in support of the 473 motion, Mr. Pippa declared "I did not realize that Diamond could or would attempt to take Saima's default while we were trying to resolve the matter with them."

[4] As noted above, the record is completely devoid of evidence that the client, rather than the attorney, took the calculated risk which ultimately led to entry of default and a default judgment for $72,500.

would not file a request for default without notifying her in writing. Thus, the motion to set aside the judgment should have been granted under the attorney fault provisions of section 473.

Because we conclude that the default and default judgment must be set aside, we need not and do not address SAIMA's second argument, that the judgment must be reversed based on the legal insufficiency of the pleadings as well the absence of substantial evidence presented at the prove-up hearing. SAIMA may test the sufficiency of the pleadings upon remand and, should the pleadings survive demurrer, Diamond may present all available evidence to support its claims in a contested proceeding.

DISPOSITION

The judgment is reversed, as is the trial court's order denying SAIMA's motion to set aside the default. SAIMA is to recover its costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.